INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

UNITED STATES OF AMERICA, APPELLANT

v.

VON'S GROCERY COMPANY AND SHOPPING BAG FOOD STORES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra,* pp. 1a–19a) is reported at 233 F. Supp. 976. The findings of fact and conclusions of law are set forth in Appendix B, *infra,* pp. 20a–52a.

JURISDICTION

The judgment of the district court dismissing the complaint was entered on December 17, 1964 (App. C, *infra,* p. 53a). The notice of appeal was filed on February 12, 1965. The time to docket the appeal was extended by the district court to June 12, and by this court to June 28, 1965. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15

U.S.C. 29. *United States* v. *Penn-Olin Chemical Company, et al.*, 378 U.S. 158.

QUESTION PRESENTED

Von's Grocery Company, the third largest seller of grocery products in the Los Angeles area, acquired Shopping Bag Food Stores, the sixth ranking chain of grocery supermarkets in the area. The question presented is whether the effect of the merger may be substantially to lessen competition in violation of Section 7 of the Clayton Act, in view of the fact that the merging companies were substantial and leading competitive factors in the retail grocery business in the area—a business which has shown significant and increasing tendencies toward concentration in the hands of a few large chains.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

This is a direct appeal from a final judgment of the district court dismissing after trial the govern-

ment's complaint alleging that the merger of Von's Grocery Company ("Von's") and Shopping Bag Food Stores ("Shopping Bag"), would violate Section 7 of the Clayton Act.

The complaint, filed on March 25, 1960, alleged that the merger would destroy the actual and potential competition between the merging companies in the distribution and sale of groceries and related products, would eliminate the significant role of Shopping Bag as an independent competitive stimulant in the market, would foster further mergers and acquisitions by other grocery supermarket chains, and would increase the concentration of ownership, management, and control of grocery supermarkets operated in the Los Angeles Metropolitan Area in the hands of a few large corporations. The merger was consummated on March 28, 1960, after the district court denied an application for a temporary restraining order.[1]

1. THE RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

The pertinent facts are substantially undisputed; most were stipulated (App. A, pp. 3a–6a). It was agreed by the parties, and found by the district court, that the defendants were engaged in interstate commerce (App. A, p. 5a; App. B, Fdg. 84); that the relevant line of commerce was groceries and related products as a whole (App. A, p. 5a; App. B, Fdg.

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[1] On June 30, 1960, the court refused a preliminary injunction which would have required separation of the two companies' operations pending the outcome of the suit, and stated that "the stores themselves are the basic assets of the business and the stores may be divested individually or in a group."

14);[3] and that the Los Angeles Metropolitan Area, consisting of Los Angeles and Orange Counties, California, was the area of effective competition and the relevant section of the country for determining the effects of the merger (App. A, p. 5a–6a; App. B, Fdg. 15). The Los Angeles area is the second largest metropolitan area in the United States in terms of population, income, and retail dollar sales. At the time of the merger, approximately 6,750,000 persons resided in the area and total retail sales of groceries were about $2,500,000,000 annually (App. B, Fdg. 15).

2. THE MERGING COMPANIES

Von's and Shopping Bag were among the leading chains of grocery supermarkets in the Los Angeles area. Both had commenced operations in the early 1930's, had grown significantly, and were large, profitable and expanding firms (App. B, Fdgs. 1–3, 6–9, 12(b)). Both companies retailed a complete line of groceries and related products at self-service, cash-and-carry supermarkets; both bought directly from suppliers; and both operated their own warehouse and distribution centers (App. B, Fdgs. 3, 5, 9, 55).

In 1958, Von's operated 27 grocery supermarkets in the area, with a sales volume of approximately $94,000,000. With 4.7 percent of total retail grocery store sales, it ranked third in the Los Angeles Metropolitan Area. Between 1948 and 1958, Von's had doubled the number of its stores, practically doubled

[3] These are the products "usually and customarily offered for sale in supermarkets and grocery stores, and consist of groceries, meats, produce, bakery goods, dairy products, delicatessen products, frozen foods, fruits, vegetables, household supplies, drugs and sundries * * *" (App. B, Fdg. 14).

its share of the market, and quadrupled its sales (App. B, Fdgs. 3, 12(b), 25).

In 1958, Shopping Bag operated 36 supermarkets with approximately $90,531,000 in sales. Thirty-four of the stores, with sales of approximately $84,164,000, were located in the Los Angeles Metropolitan Area. This gave Shopping Bag approximately 4.2 percent of the total retail grocery store sales and a rank of sixth in the area. Between 1948 and 1958, with an increase from 15 to 34 stores in the area, Shopping Bag more than tripled its share of the market and enjoyed more than a sevenfold increase in sales (App. B, Fdgs. 9, 12(b), 25).

Combined, the merging companies would have ranked first in terms of total sales in 1958 with approximately 8.9 percent of the market (App. A, p. 8a; App. B, Fdg. 74).[8] Von's ranked second to Safeway after the merger in 1960.

[8] A table incorporated in the court's opinion (App. A, p. 8a) lists the market share and industry rank of the ten leading chains for 1958 as follows:

	Rank in sales		Sales in Los Angeles Metropolitan Area	Percentage
	Before merger	After merger		
Total of Von and Shopping Bag		1	$177,867,000	8.9
Safeway	1	2	161,232,000	8.0
Ralph's	2	3	128,268,000	6.4
Von's	3		93,708,000	4.7
Market Basket	4	4	88,806,000	4.4
Thriftimart	5	5	88,553,000	4.4
Shopping Bag	6		84,164,000	4.2
Food Giant	7	6	72,757,000	3.6
Alpha Beta Raisins	8	7	62,727,000	3.1
Fox Markets	9	8	56,438,000	2.8
Mayfair	10	9	39,900,000	2.0
Total				43.6

3. THE ROLES OF THE MERGING COMPANIES IN COMPETITION IN THE MARKET

The district court found that the twenty leading chains of supermarkets in the Los Angeles area were all part of a network of retail grocery store competition in which the major grocery chains, as well as other grocers, "frequently responded to competitive practices originated by one of the other major chains" (App. B, Fdgs. 39, 41). Von's and Shopping Bag were both found to be "substantial competitive factors" in this market (App. B, Fdg. 42). They were among the relatively few firms which were able to engage in area-wide advertising, particularly in the metropolitan newspapers with broad circulation (Gx. 17, Gx. 18, Gx. 19).[4] Prior to the merger the major chains, including Von's and Shopping Bag, carefully checked and responded to each other's pricing policies (Gx. 23). Indeed, these two firms were among the seven which were included in a widely circulated pricing survey utilized by chain and independent grocery retailers in setting prices for their grocery items (Gx. 21).

As to direct competition between individual Von's and Shopping Bag stores the court found that, where the stores were so "located that both could compete for some of the same customers," "the competition was intensive" (App. B, Fdg. 41). The court noted that the average customer was willing to drive at least 10 minutes, or about 4 miles, to reach a particular

[4] In 1959, Von's net cost for advertising was $738,906 and Shopping Bag's gross expenditures (without allowance for cooperative advertising) were $1,187,627 (Gx. 19).

store (App. B, Fdg. 39), but refused the government's request that it make specific findings as to which of the individual stores were in direct competition for the same customers prior to the merger (Motion under Rule 52(b), pp. 4-8). Although the court suggested that such competition was rather limited,[5] the undisputed evidence shows the substantiality of this "intensive" competition.

Documents introduced by the defendants acknowledged that more than 20 percent of the stores operated by both firms prior to the merger were so located that they were likely to draw customers from overlapping areas (Dx. AV, exhibit E; Dx. BF, pp. 31-34, 77). The sales of these 17 stores in 1960 exceeded $43,000,000—$21,000,000 for Von's stores and $22,000,000 for Shopping Bag stores (Gx. 13).[6] The Government's evidence showed that the direct competition between individual stores was even greater. The testimony indicated that on the basis of ten-minute driving time, almost half of the stores of the two concerns, with sales of approximately $76,000,000, were in a position

[5] It found that there was such direct confrontation in "only four or five areas" (App. B, Fdg. 53), but did not state the number of stores of the merging chains located in those areas.

[6] While only part of the total sales of these 17 stores was made to customers who had readily available to them the competing products of both a Von's and a Shopping Bag store, the fact that each of these stores had to compete with the rival chain for a number of customers and a significant amount of business assured the benefits of competition to all the customers of each store. Thus, the district court found that "the competition was intensive" where stores were so "located that both could compete for some of the same customers" (App. B, Fdg. 41).

to compete directly for the business of over one million customers (Gx. 85, Tr. June 14, 1963, pp. 385–388). In 1960 total sales of the Von's stores so located were $35,126,288 and total sales by Shopping Bag stores so located were $40,639,913 (Gx. 13).

Further undisputed evidence showed that there was a pronounced tendency on the part of both firms to open stores in the same newly developed shopping areas (Gx. 79, 80, 81, 82).

4. THE COMMERCIAL SETTING OF THE MERGER

The changing market structure of grocery retailing in the Los Angeles area is well documented. There has been a continuous decline in the number of small, single-store operators and an increasing trend to large scale supermarkets operated by local and national chains. The court found that between 1950 and 1963, the number of single store operators decreased 1,775, from 5,365 to 3,590 and the number of stores operated by chains of 2 or more stores increased 102, from 856 to 958 (App. B, Fdg. 23).

The decline in the total number of stores was accompanied by a marked increase in the percentage of total retail grocery sales controlled by large chains. In 1948 the 20 leading chains did 43.8 percent of the business; in 1958 they accounted for 56.9 percent (App. A, p. 9a). Department of Commerce statistics also show that the market shares accounted for by the 8 largest chains in the area increased from 33.7 percent in 1948 to 40.9 percent in 1958; for the 12 largest chains, from 38.8 percent in 1948 to 48.8 percent in 1958; and for the 16 largest chains, from 41.6 percent in 1948 to 53.4 percent in 1958 (Gx. 6, 7).

The trend will apparently continue. The leading chains account for a predominant share of the business flowing from new openings. The 20 leading chains enjoyed 67.8 percent of the total dollar sales of grocery stores opened in the area in 1960 (Gx. 43). They opened 25 of the 29 new stores that had sales over $2 million each in that year (Gx. 37).

The period since 1948 has also been characterized by a pattern of purchases of established stores and sales of unwanted locations by the major chains operating in the Los Angeles Metropolitan Area. A table prepared from figures obtained by the Federal Trade Commission as a part of its study of food marketing shows that in the period 1948 through 1958, nine of the twenty leading chains acquired 126 grocery stores from concerns outside the top 20 chains. In 1958, 99 of the acquired stores were still operated by the acquiring chains and had sales of $192.9 million. During the same years these chains were disposing of a substantial number of unwanted outlets. While the record does not show the sales volumes of the stores disposed of by the leading chains, it does show that, without the acquired stores. the market share of the 20 top chains in 1958 would have dropped from 56.9 percent to 47.3 percent (Gx. 90, para. 11).[7]

[7] Data prepared by a principal defense witness showed that five of the leading ten chains in 1958 made acquisitions of stores in the area between 1957 and 1961 (Gx. 78).

Recently American Stores, Kroger, and Food Fair, three national chains not previously operating in the Los Angeles Metropolitan Area, have acquired some or all the stores operated by Alpha Beta, Market Basket, and Fox, large local chains. Alpha Beta and Fox had themselves grown by acquisition. (App. B, Fdgs. 60, 75(c), 76, Gx. 78).

5. THE DECISION OF THE DISTRICT COURT

Noting that, because of the stipulations, it was called upon to decide only whether the effect of the merger may be substantially to lessen competition in grocery products in the Los Angeles area, the district court concluded that this was not its likely effect. The decision was based both on the opinion testimony of some of the industry witnesses and on the absence of any direct evidence that the merger had caused a substantial change in competitive conditions in the grocery market in Los Angeles.

The district court emphasized the large number of competitors in the market, the present vigor of competition, and the continuing possibility of successful entry and growth in the market, despite the competition of the large chains. "It thus appears", the court said, "that the government in this case is really relying upon a mere union between '2 substantial competitive factors.' This, in practical effect, goes back to the Section 7 test which was in effect prior to the amendment of the act in 1950, and was eliminated as was clearly pointed out in the Senate Report. The government argues that over-all competition has been substantially reduced by the merger, but the proof falls short of establishing such to be the case. In fact, the figures relied upon by the government tend to establish to the contrary. Again it is repeated that in 1960 the approximately 4,800 stores in the area were operated by 4,000 separate concerns. The merger here did not materially change that situation." (App. A, pp. 15a–16a).

THE QUESTION IS SUBSTANTIAL

The Report of the House Judiciary Committee on the 1950 Clayton Act amendments made clear that a tide of concentration in traditionally competitive, "small business" industries, including specifically the food industry, was a matter of primary concern to Congress (H. Rep. No. 1191, 81st Cong., 1st Sess., p. 3):

> * * * [T]he current movement [the merger trend] has had the result of raising the level of economic concentration in a number of very specific ways. In the first place, recent merger activity has been of outstanding importance in several of the traditionally "small business" industries. More acquisitions and mergers have taken place in textiles and apparel and food and kindred products—predominantly "small business" fields—than in any other industries.

This case presents a substantial and important question as to the appropriate standards for application of Section 7 of the Clayton Act to "small business" industries—in particular, to a retail business which historically was marked by a large number of sellers and relatively low concentration, but which now shows a marked trend toward acquisitions, fewer firms, and increasing concentration. The decision in this case will largely determine the structure of the market for retail groceries in the important Los Angeles Metropolitan Area. Even more important, it will provide a significant guideline for similar retail sectors of the economy throughout the nation.

The instant merger took place in a market in which a decreasing number of firms have been obtaining a rapidly increasing share of the total business and in which the trend of openings suggests acceleration of the same tendency. It united two leading firms whose pricing policies are followed not only by the other major chains but by the entire retail grocery industry; the merger eliminated all competition between these firms whose combined annual sales totalled $177.9 million or 8.9 percent of the market. We submit that in this kind of a market, a merger of two such firms contravenes the policy of Section 7—repeatedly emphasized in the legislative history of the Act and the decisions of this Court—to halt the rising tide of economic concentration in the American economy and to preserve an economic way of life permitting the successful coexistence of numerous independent units. *Brown Shoe* v. *United States*, 370 U.S. 294, 315, 333.

1. The merging chains in this case were major competitive factors in the Los Angeles market. In terms of sales, industry position, market shares, number of supermarkets operated, and expansion activities, they ranked among the largest and most significant entities in the retail grocery business there. The record amply supports the lower court's finding that they were "substantial competitive factors" in the network of retail grocery store competition in the area.

As the third and sixth largest chains, Von's and Shopping Bag occupied imposing positions of market leadership. They were each among the few large chains whose pricing policies were surveyed by the

other major chains in establishing their own prices.[8] They were among the seven firms included in a widely circulated pricing survey utilized by both chains and independent retailers in setting prices for their grocery items. Only a few competitors could afford to compete with the merging companies in the kind of area-wide advertising which they used and which had a substantial impact on pricing.

The direct competition between Von's and Shopping Bag was obviously not limited to the neighborhoods in which each had stores. The record shows conclusively that each followed the area-wide pricing policies of the other, as each had to if it was to compete in the neighborhoods where both had stores. See n. 6, p. 7, *supra*. But even the amount of neighborhood-competition—which the district court described as "intensive"—was substantial. The store-to-store competition extended to stores whose total annual sales amounted to $43,000,000 annually, or to $76,000,000 annually, depending upon whether one accepts the government's analysis or the defendants'. In either event, this direct competition was of substantial proportions. Cf. *Standard Oil Co. of California* v. *United States,* 337 U.S. 293. Moreover, both companies had aggressively expanded in size and number

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[8] The former president of Shopping Bag, currently a vice president of Von's, testified that he considered "Safeway and Von's, Food Giant and Ralph's," all large chains, when he set Shopping Bag's prices (Gx. 25). He also testified that Shopping Bag met the prices of Von's and the other larger chains, but was not generally concerned with "Mom and Pop" store prices (Gx. 23).

of stores, were able to compete for new store locations, and were moving into the same newly developed suburban areas. (App. B. Fdgs. 3, 9; Gx. 79, 80, 81, 82).

The elimination of competition between the two firms was in and of itself sufficient to condemn the merger. In terms of size, condition, position in the market and past performance, these two strong chains were substantial competitive factors in a market where not many could be said to fit that description, despite the number of enterprises in the business. The Court has recently reaffirmed the proposition that a merger of "major competitive factors" violates Section 1 of the Sherman Act, "without reference to the strength or weakness of whatever competition remained." *United States* v. *First National Bank*, 376 U.S. 665, 670, 673. There can be little doubt that a merger which would violate Section 1 is also contrary to Section 7, the purpose of which was to prohibit mergers whose effects upon competition are less immediate than those proscribed by the Sherman Act. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 318, n. 33.

It is hardly necessary to add that the court below was mistaken in believing that the 1950 amendments to Section 7 removed "a mere union between '2 substantial competitive factors'" from the reach of the statute by eliminating specific reference to competition between the merging companies (App. A, pp. 15a–16a). It is entirely clear that, when Congress amended Section 7, it had no intention to declare

such an immediate loss of competition to be of no relevance, or even to be of reduced importance; it was merely adding other types of anticompetitive effects to those which the statute had long prohibited. As this Court said in ***Brown Shoe, supra,*** at 317, "by the deletion of the 'acquiring-acquired' language in the original text, it [Congress] hoped to make plain that Section 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country."

2. The anticompetitive effects of the merger between Von's and Shopping Bag are significantly increased by the rapidly concentrating market structure in which the merger took place. The court found that between 1948 and 1958 the share of the market enjoyed by the 20 leading firms increased from 43.8 percent to 56.9 percent, or by almost thirty percent. The increase of the shares of the top eight, twelve, and sixteen firms is equally imposing (see, ***supra,*** p. 8), especially in view of the offsetting loss of Safeway's predominant market position during the same years. The evidence as to new openings indicates that the tendency to increasing concentration will continue even without the accelerating force of significant mergers. The twenty leading chains enjoyed 67.8 percent of the sales made by stores opened in 1960.

Section 7 of the Clayton Act was intended to prevent mergers between significant competitors which

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accelerate the already rapid processes of concentration in a market such as this. In the second largest retail market in the United States, two of the six largest supermarket chains have combined to form a single entity with annual sales of $177.9 million. By almost doubling the size of a concern which was already the third largest in the area, the present merger increased the share of the market enjoyed by the three largest chains from 19.1 percent (in 215 stores) to 23.3 percent (in 249 stores), an increase of 21 percent. The district court's failure to bar that merger, unless reversed by this Court, stands as an open invitation to countermoves in the market.

The merged firm's eight-percent share of the market in this case is substantially greater than the five-percent of the similarly fragmented retail shoe business which, in ***Brown Shoe* v. *United States,*** 370 U.S. 294, was viewed as constituting a "substantial" share of the trade in a city, a share which "may have important effects on competition" (370 U.S. at 343). In ***Brown Shoe,*** this Court noted that: "If a merger achieving a 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares." 370 U.S. at 343–344. The same threat is present here where the leading chains have increased their share of the market by purchases of desirable competing stores and the sale of unwanted outlets and where major national chains have recently entered the market through wholesale acquisitions of large local chains. See *supra*, pp. 8–9 and n. 7.

The threat of ever-increasing concentration in the Los Angeles market structure is by no means rebutted by the district court's findings that this is an industry traditionally marked by ease of entry and in which a number of sturdy competitors have grown from small beginnings. The 20 leading chains are enjoying more than two-thirds of the business of new stores for good reasons. Entry and expansion by small operators are limited by the natural preference of shopping center operators for established large chains. As the district court found, shopping centers, which are increasingly important as the sites for business growth, prefer "a large grocery chain with a well-advertised name" and a secure financial position; "smaller concerns therefore have difficulty in obtaining shopping center locations" (App. B, Fdg. 54). Small firms cannot compete in effective advertising with the large chains which alone have sufficient resources and a large enough market to warrant the expense of popular media of area-wide circulation. See, *supra,* p. 6, n. 4. Even the amount of capital required simply to open a supermarket of the optimum size and style for grocery retailing in the current market is much greater than that required for the old-style grocery which was within the reach of so many potential entrants.

3. Much of the importance of this case stems from the fact that what has occurred in the very large Los Angeles market is typical of what has occurred throughout the United States. In January 1960 the Federal Trade Commission published a staff report en-

titled "Economic Inquiry Into Food Marketing" (hereafter, "Economic Inquiry"), which revealed that between 1948 and 1958 food chains with 11 or more stores increased their share of total national grocery sales from 34.5 percent to 43 percent, an increase of almost 25 percent. *Economic Inquiry,* p. 5. In the decade ending in 1958 these chains acquired about 2,238 stores of which they retained 1,550 in 1958, accounting for 9 percent of total sales of such chains in 1958 (*id.* at 16). In 1956, when these chains had less than 41 percent of total grocery store sales, they opened almost 70 percent of the large new supermarkets (*id.* at 15). By 1960 the cost of a new supermarket had approached $500,000 (*id.* at 11).

Partly in recognition of this trend—which has been a source of continuing concern to Congress [9]—the President recommended and Congress passed Senate Joint Resolution 71, 88th Congress (78 Stat. 269), which created a National Commission on Food Marketing charged with evaluating "[the] effectiveness of the * * * regulatory activities of the Federal Government in terms of present and probable developments in the industry." The effectiveness of the anti-merger provisions of the Clayton Act as an instrument of federal policy in the area of retail marketing of groceries depends upon the standards governing a merger such as this one, and it is, therefore, important for this Court to establish them.

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[9] See, *e.g.*, *Status of Small Business in Retail Trade (1948–1958)*, a staff report to the Select Committee on Small Business of the House of Representatives (December 16, 1960), 86th Cong., 2d Sess., p. 33.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT L. WRIGHT,
Acting Assistant Attorney General.

ROBERT B. HUMMEL,
ELLIOTT H. MOYER,
JAMES J. COYLE,
Attorneys.

JUNE 1965.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

BURKE MARSHALL,
Assistant Attorney General.

HAROLD H. GREENE,
[illegible] H. NORRIS,
LOUIS F. CLAIBORNE,
Attorneys.

JUNE 1963.

APPENDIX A

United States District Court, Southern District of California, Central Division

No. 336–60–CC Civil

UNITED STATES OF AMERICA, PLAINTIFF

v.

VON'S GROCERY COMPANY AND SHOPPING BAG FOOD STORES, DEFENDANTS

Memorandum Opinion

Filed: September 14, 1964

This is an action instituted by the United States to enjoin the acquisition of Shopping Bag Food Stores by Von's Grocery Company which, it is alleged, violates Section 7 of the Clayton Act (15 U.S.C. § 18). Prior to March 28, 1960, the defendants operated as separate corporations; they are now merged. Jurisdiction exists in this court under Section 15 of the Clayton Act (15 U.S.C. § 25). Plaintiff contends and defendants deny that the effect of the merger between the defendants in this proceeding may be substantially to lessen competition or tend to create a monopoly, in violation of Section 7 of the Clayton Act.[1]

[1] Clayton Act, § 7, 15 U.S.C.A. 18 (1963), 38 Stat. 730 (1914): "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission (shall acquire the whole or any

The complaint was filed on March 25, 1960, and on March 28, 1960, an application for a temporary restraining order was denied by another judge of this court. Thereafter an application was made by plaintiff for a preliminary injunction to require Von's and Shopping Bag to be operated as separate entities pending trial of the action. This application was also denied by another judge of this court on June 13, 1960, and on July 1, 1960, interlocutory findings of fact and conclusions of law and the interlocutory order denying the motion for preliminary injunction were filed.

On April 24, 1961, a pretrial conference order, signed by the parties, was approved by the court. On December 15, 1961, plaintiff filed a motion for summary judgment which was also denied by another judge of this Court.

Beginning in November, 1962, and while discovery proceedings were in progress, efforts were made by the court and counsel to arrive at a method for the presentation of the evidence which would expedite the trial which had been estimated to consume from two to three months. A plan was finally formulated and stipulated to by the parties whereby either side might present, in lieu of oral testimony, affidavits of persons who had been expected to testify. Thereafter the opposing party, if it were desired, could cross-examine such witness by taking a deposition. This procedure was followed with respect to practically all of the witnesses which the parties had anticipated calling at the trial. Both parties called a relatively few witnesses to present oral testimony

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part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. * * *"

at the trial. As a result of the pretrial procedures, the case consumed only approximately five days in actual trial time. Also a great many of the facts in the case were either stipulated to or admitted.

In accordance with the pretrial order, as amended, the following facts were admitted and required no proof:

It was agreed that the trial should be confined to the issue of whether the merger violated Section 7 of the Clayton Act and the matter of relief; in the event it was determined that Section 7 had been violated, hearings would thereafter be held as to appropriate relief; Von's was a Delaware corporation with its principal place of business at Los Angeles, California; subsequent to the merger it moved its offices to the former Shopping Bag headquarters at El Monte, California; Von's was one of the leading chains of supermarkets in the Los Angeles area; it and its predecessors had been engaged in the purchase, distribution, and retail sale of a complete line of groceries and related products since 1932; in 1959, Von's operated 28 supermarkets in the Los Angeles area with a total annual sales of approximately $85,000,000 for an average of approximately $3,000,000 in sales per store; also its supermarkets are of the self-service, cash and carry type;

Von's also owned and operated a modern distribution center; direct railroad and truck shipments were made to this distribution center which provided facilities to receive and distribute the groceries to Von's supermarkets throughout the Los Angeles area; after the merger Von's sold its distribution center to a competitor and has since used the former Shopping Bag distribution center;

Shopping Bag was a California corporation with principal offices at El Monte, California; on the date

of the merger, Shopping Bag was merged into Von's; prior to the merger, Shopping Bag was a leading chain of supermarkets; it and its predecessors had been engaged in the purchase, distribution, and retail sales of a complete line of groceries and related products in the Los Angeles area since 1933; in 1959, Shopping Bag operated 36 complete supermarkets in the area, which had a total annual sales of approximately $79,000,000 for an average of approximately $2,100,000 in sales per store; all of its stores were of the self-service, cash and carry type;

In 1958, Von's ranked third and Shopping Bag fifth in terms of total sales by grocery stores in the Los Angeles metropolitan area; Von's had approximately 4.10% and Shopping Bag approximately 3.09% of all grocery store sales in the area; Shopping Bag ranked sixth and Von's eighth in terms of total number of markets operated in the area in that year; combined, Von's and Shopping Bag ranked second in terms of dollar of sales and in terms of total number of supermarkets in the metropolitan area; following the merger, Von's accounted for approximately 8% of all grocery sales in the area; taken as a whole, the following products were agreed to constitute the relevant line of commerce in the case: groceries, meats, produce, bakery goods, dairy produce, delicatessen produce, frozen foods, fruits, vegetables, household supplies, drugs, and sundries; in 1959, the sale of food products accounted for 90% of all sales by grocery stores in the area;

The relevant trade area in which defendants operated prior to the merger was the Los Angeles metropolitan area consisting of Los Angeles and Orange Counties; Los Angeles ranks as the second largest metropolitan area in the United States in

terms of population, income, and retail dollar sales; approximately 6,750,000 persons reside in the area and total retail sales were approximately $9,100,000,-000 in 1957; the Los Angeles metropolitan area is an appreciable trade area and a section of the country within the meaning of Section 7 of the Clayton Act; sales of groceries in the area approximate $2,500,-000,000 annually;

Von's and Shopping Bag prior to the merger were engaged in interstate commerce and Von's presently is engaged in interstate commerce; several cooperatives operate in the metropolitan area, some who sell to nonmembers; Orange Empire, a cooperative, services numerous retail members and nonmembers in California, Arizona, and Nevada with an annual wholesale sales of approximately $280,000,000; prior to the merger, the twenty leading chains of supermarkets were all a part of the retail grocery competition in the area and each of the chains competed with each other; there was direct competition between some of the Von's stores and some of the Shopping Bag stores, particularly in those instances where the stores were so located that they were competing for the same customers.

With respect to the issues of fact and law, the parties are in agreement as follows: (1) that the defendant corporations were engaged in interstate commerce; (2) that the court has jurisdiction; (3) that any products or groups of products which are of sufficiently peculiar characteristics and uses as to make them distinct from all other products are in line of commerce within the meaning of Section 7 of the Clayton Act and that groceries and related products, taken as a whole, have such peculiar characteristics and uses in the operation of retail grocery stores;

(4) that groceries and related products are the relevant line of commerce for determining whether the instant merger violates Section 7; (5) that the area of effective competition is a section of the country in the instant case; (6) that the relevant section of the country need not be the entire nation; (7) that the Los Angeles metropolitan area is a relevant section of the country for determining the effect of the merger.

In view of the stipulations and pretrial orders, it thus appears that the court is called upon to decide only the issue as to whether the merger may be substantially to lessen competition or tend to create a monopoly in the line of commerce and section of the country here involved.

The government apparently in one of its latest memoranda insists, at least inferentially, that the impact upon suppliers is involved as one of the issues in the case. However, it is to be noted that in the pretrial order, as amended, it is stated that defendants assert that the Los Angeles area is not the relevant section of the country as to the wholesale sale and purchase of groceries. There also appears the following:

> "The government assumes no burden of proof as to the relevant section of the country at the wholesale level since *it intends to base its case on the probable effects of the merger in the relevant section of the country for grocery retailers which is the Los Angeles metropolitan area.*" [Emphasis supplied.]

Obviously the pretrial order confined the parties to the matters agreed to therein. Furthermore, the government made no attempt to predicate its case upon the basis that suppliers had been eliminated.

Both the legislative history[2] and decisions of the Supreme Court, beginning with *Brown Shoe Co.* v. *United States,* 370 U.S. 294, set forth the purpose of Section 7 of the Clayton Act. The act was intended to prevent a merger or acquisition of assets when the effect may be to substantially lessen competition or tend to create a monopoly. It was noted in *Brown Shoe Co.* v. *United States,* at page 332, United States Reports: "But the very wording of § 7 requires a prognosis of the probable *future* effect of the merger" (italics original). It would appear that in order to determine the future effect resort must be had to the developments in the retail grocery business in the area in question. In making this determination it must be kept in mind that the act intended to cover more than the Sherman Act, yet to stop short of the stated test of Section 7 as it existed at the time the matter was before the Congress for amendment.

The legislative history[2] indicates that the purpose of the proposed amendment to Section 7 was to prohibit the acquisition of the assets of another corporation when the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly. The over-all purpose was to limit further growth of monopoly and aid in preserving small business. On the one hand, it was desired that the test be more inclusive and stricter than that of the Sherman Act; on the other hand, it was not desired that the legislation go to the extreme of prohibiting all acquisition between competing companies. The intent was to cope with monopolistic tendencies in their incipiency and before they had attained such effects as to justify a Sherman Act proceeding. It should be noted that the Senate Report states:

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[2] Senate Report No. 1775, 2 U.S. Code Congressional Service, pp. 4293-4300 (81st Congress, 2nd Session, 1950).

"These various additions and deletions—some strengthening and others weakening the bill—are not conflicting in purpose and effect. They merely are different steps toward the same objective, namely, that of framing a bill which, though dropping portions of the so-called Clayton Act test that have no economic significance, reaches far beyond the Sherman Act." (p. 4297)

The words, "may be," appear in the bill in defining the effect on competition. The committee's report states:

"The use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed effect, * * *" (p. 4298)

Before the merger, Von's percentage of sales was 4.7%, while Shopping Bag's was 4.2%. Combined, they represent 8.9% of the sales of the metropolitan area. The following table shows the industry rank and share of the total grocery sales of the 10 leading chains in the area in 1958:

	1958 Rank in Sales		Sales in Los Angeles Metropolitan Area	Percentage
	Before	After		
	Merger			
Total of Von and Shopping Bag	....	1	$177,867,000	8.9
Safeway	1	2	161,233,000	8.0
Ralph's	2	3	128,283,000	6.4
Von	3	....	93,708,000	4.7
Market Basket	4	4	88,806,000	4.4
Thriftimart	5	5	88,583,000	4.4
Shopping Bag	6	....	84,104,000	4.2
Food Giant	[illegible]	6	72,727,000	3.6
Alpha Beta Raisins	8	7	62,727,000	3.1
Fox Markets	9	8	56,438,000	2.8
Mayfair	10	9	39,300,000	2.0
Total	....	....	....	43.6

The change in the number of stores in the area is indicated by the following computations, the word,

"multiple," meaning units of two or more stores operated as one concern:

	Jan. 1, 1950	Jan. 1, 1961	Jan. 1, 1963
Single	5,365	3,818	3,590
Multiple	856	923	958
	6,221	4,741	4,548

Between 1948 and 1958 the market share of the 20 largest chains increased from 43.8% to 56.9%. The government contends that the merger had the effect of substantially lessening competition in that separate conduits through which substantial quantities of groceries and related products flowed were united into a single organization; also that the merger united purchasing and warehousing functions, the purchase of advertising as well as all other functions which had formerly been carried on by each of the two corporations.

The government industry witnesses were single store operators and in practically every instance testified that in their opinion the merger would lessen competition. In most instances, their opinions were of little assistance since at best they were merely conclusions without supporting data or explanation. The defendants presented numerous industry witnesses who testified that the merger would increase competition rather than decrease it. The government did not cross-examine the defense industry witnesses; but the defendants cross-examined the industry witnesses produced by the government. While the government offered some evidence to account for the decrease in the number of single stores, in the main it predicated its position upon the decrease in the number of such stores with the increase in population at the same time.

Many factors appear to account for the decrease in stores and most of those factors are not necessarily

connected with the growth of the chains. For example: in 1931, Safeway had approximately 1,000 stores in the area and today it has only 147. The reason for this appears to be the development of the supermarket, the shopping centers, and the decrease of the small neighborhood grocery store. Furthermore, the shift in the population, the shift in transportation from streetcars to automobiles, and many changes in merchandising methods effected the change to the supermarket era. The evidence as to closed chain stores disclosed many reasons for such closings such as failure of some of the local chains, closings to move to what were considered better locations, closings because of the change to the supermarket store, and in some instances the movement of population. Also many of the disappearing single stores became part of chains of two or more stores. One of the important factors in many of the failures was lack of previous experience in the grocery business; however, it was impossible to arrive at the number of failures in this category. It was impossible to determine the number of closings of grocery stores because of the construction of freeways, although the number must have been substantial.

The evidence showed that many persons had entered into the grocery business in recent years often as single store operators and had been successful in increasing their business from year to year. For example: Wood, a grocer, has developed a 10-store chain since 1954, while Grocer Goodnight left a major chain in 1959 and since 1960 has developed a 7-store chain. Defendants produced at least 10 witnesses who had opened single stores in recent years and who have continued to increase their sales year by year. In each instance, they have been competing with the major chains with stores located close to them. One outstanding example was that of Grocer Gelson, who

began with assets of $5,000 in 1946 in a small market in North Hollywood. In 1951, he sold this and ultimately ended up in a market in Encino. His annual sales now are approximately $6,000,000, although he is in competition with stores of the larger chains, the smaller chains, and others.

One thing that stands out in the case is the fact that many executives from chain store operations have left the various chains and opened up stores on their own, usually beginning with a single store and ultimately developing into a small chain of supermarkets. An executive for one of the chains testified that one of the great problems for the larger chains was the loss of executives who were leaving to open grocery businesses of their own. In many instances, these persons have purchased a single store of one of the chains, usually where it was not doing too well, and from that point developed a successful grocery retail business. The experience gained while employed by larger chains has apparently been the basis for the success of many of these operations.

On the other hand, it is to be noted that several of the smaller chains encountered difficulty because of lack of experience, overexpansion, and lack of capitalization and were forced into bankruptcy or compelled to sell. The evidence leaves no doubt that experience in the grocery business has usually made it possible for a person to enter the retail grocery field as a single store operator and be successful.

Witness Lebhar, Editor-in-Chief of "Chain Store Age," which publishes "Chain Store Age," "Shopping Center Age," "Discount Store News," and who is also an officer of the Board of Business Guides, Inc., and other publications, testified that the number of concerns operating two or more grocery stores in Los Angeles and Orange Counties increased from 96 in

1953 to 150 in 1962 but that the greatest increase during the period occurred in the number of concerns operating 2 or 3 stores. Such concerns increased 86%—from 56 to 104. His testimony also showed that 7 of the 24 chains which operated 10 or more stores in 1962 were not in business as chains in 1953.

It is interesting to note that in 1948 Safeway accounted for 14.2% of sales in the area and Ralph's, 6.9%, for a total of 21.1%; but in 1958, Safeway and Ralph's combined had declined to 14.3% despite a substantial increase in their sales volume. In other words, during the period when it is claimed that the competitive situation was deteriorating, single store operators and small chains were beginning, growing, and competing successfully.

In 1960, the approximately 4,800 stores in the area were operated by 4,000 separate concerns. During 1960, 128 new "single outlet" stores opened. The leading 20 chains opened 67 new stores in 1960 against 171 by smaller chains and single store operators. While the 10 leading chains accounted for 43.6%, the remainder, including 3,818 single store operators, accounted for 56.4% of the sales in the area in 1960. Another indication of the competitive situation is the fact that Shopping Bag's gross increased while its profits decreased. The witness, Hayden, president of the company, testified that this was occasioned by competition as well as the need for experienced executives.

There was considerable evidence relative to the part played in the grocery business by the so-called cooperatives, namely: the Certified Grocers of California, Ltd., Spartan Cooperative, and Orange Empire. (There is disagreement by the parties as to whether Orange is a cooperative or merely a grocery

wholesaler.) Each of these sells only to its members; however, there is apparently no restriction upon those who may become members. The role of the cooperative is of major importance in the distribution of groceries. Certified is wholly owned by the grocery retailers who buy through it. Its membership consists of approximately 900 grocery concerns which operate almost 1,600 retail stores. Spartan Grocers is a wholly owned subsidiary of Certified with approximately 1,200 members who operate 1,255 stores. Most of their members are engaged in business in Los Angeles and Orange Counties. Certified handles more than 13,000 items, including dry groceries, frozen foods, delicatessen products, and various non-food products, including housewares and appliances.

The evidence indicated that some of the larger chains buy their grocery products through Certified. Certified's annual sales increased from $87,000,000 in 1948 to $345,000,000 in 1962.

Orange Empire with approximately 1,000 members accounted for wholesale sales of $321,000,000 in 1962. Certified, Spartan, and Orange do not carry fresh meat or produce or certain dairy products. Generally speaking, the three, Certified, Spartan, and Orange, are made up of a membership of smaller concerns operating from 1 to 20 stores. In so far as the products which are sold by the 3 cooperatives are concerned, there can be little doubt that the single operator or small grocer can compete effectively with the large chains or anyone else in purchasing such groceries.

As to produce which is not distributed by the 3 co-operatives, the evidence indicates that the single store or small operator could effectively compete in purchasing such produce. The government appeared to contend that the large chains had a substantial advan-

tage in the purchase of meat supplies. However, the evidence failed to support this claim.

Another group now participating in the distribution of groceries is the discount house. The evidence indicates that this phase is expanding rapidly and may well indicate a substantially additional competitive force. While the development of the discount house apparently indicates a return to the general store, so, in turn, is the supermarket moving more and more toward the concept of a general store. Many of them now include not only groceries but hardware, appliances, liquor, and many other items which in the past have been distributed by specialty stores.

One of the contentions made by the government is that the chains have a distinct advantage over the smaller concerns in obtaining space in the shopping centers. This is probably true since the average builder of a shopping center is anxious to obtain a longtime lease by a large chain with a well advertised name which will attract attention and also induce other large concerns to lease areas in the shopping center. It is only natural that the shopping center owner would prefer the company with the greater financial resources. Shopping centers are usually in new developments and require some pioneering. The record does not disclose the number of supermarkets in shopping centers or a definition of "shopping centers."

One of the witnesses for defendants, Campbell Stewart, gave testimony which should be accorded considerable weight. He operated retail grocery stores in the area from 1927 to 1945, at which time he became general manager and vice president of Certified. In 1955 he became president, retiring in 1961 although continuing his employment as con-

sultant to Certified. He pointed out that his organization was started by 15 owners of 1 or 2 stores so that they could pool their purchases and enjoy quantity discounts obtained by the larger concerns. At the time of trial, he testified that Certified is the largest retail-owned food wholesaler in the United States; that Certified is directly concerned by any development in the food retail business which might affect small grocery retailers since they have always been and still are the primary source of Certified's business. He stated that, if the small retailers were placed at a competitive disadvantage, Certified would be adversely affected. He went on to state that in his opinion the merger in question would not tend to substantially lessen competition.

The government's case appears to be predicated upon the following: (1) the union of 2 substantial competitors in the area, (2) increased concentration, (3) a reduction of separate competitive factors, and (4) the elimination of the acquired firm as a separate competitive entity. It will be readily noted that propositions 2, 3, and 4 are necessarily included in proposition 1, that is, the union of 2 substantial competitors. Obviously when 2 substantial competitors merge there has to be increased concentration and a reduction of the separate competitive factors as between the two and the elimination of one as a separate competitive entity. It thus appears that the government in this case is really relying upon a mere union between "2 substantial competitive factors." This, in practical effect, goes back to the Section 7 test which was in effect prior to the amendment of the act in 1950, and was eliminated as was clearly pointed out in the Senate Report. The government argues that over-all competition has been substantially reduced by the merger, but the proof falls short of

establishing such to be the case. In fact, the figures relied upon by the government tend to establish to the contrary. Again it is repeated that in 1960 the approximately 4,800 stores in the area were operated by 4,000 separate concerns. The merger here did not materially change that situation. It did not increase or decrease competition store for store with any grocer, single store, or chain, since the acquired stores continued as before. As between stores, only a few of those of Von's and Shopping Bag were in direct competition since generally each company's stores were in different localities of the area. A few did compete directly. Apparently the reason for the failure of the evidence to pinpoint a decrease in competition was because there was actually no decrease.

The parties stipulated to the following, showing the breakdown of concerns in the area in 1962:

Concerns operating:	*No. of concerns*
10 or more stores	24
4 to 9 stores	22
2 to 3 stores	104
1 store	3,709
Total	3,859

It was also stipulated as follows:

> "4. The following table compares the number of stores operated by and the combined market share of the 20 largest chains in the area in 1958 with the smaller chains and independents.*

* (Reference to footnote omitted.)

	No. of Stores	Market Share	
		Govt. Figures	Def. Fig.
Top 20 chains	598	56.9%	54.3%
Independents and smaller chains	4,301	43.1	45.7"

Here it should be noted that the government seeks to have the court disregard evidence of what occurred after March 20, 1960, the date of the filing of the suit. It is difficult to take such a contention seriously in view of the government's reliance upon facts occurring up to as late as January 1, 1963. For example: Government Exhibit 35 sets forth the number of single and multiple stores as of January 1, 1963, and the government in its proposed findings of fact included these figures. The government's proposed findings of fact also set out figures for both 1961 and 1962 repeating single and multiple stores. Suffice it to say that both *Brown Shoe* and *DuPont* refer to facts occurring after suit was filed and during the pendency of the suit. It would indeed be an incongruity for a court to close its eyes to facts which would, with a reasonable degree of certainty, establish whether or not there was reasonable probability of the lessening of competition and predicate its decision solely upon prediction or prognosis. A court of equity cannot at the time of its decree disregard changed conditions since the filing of the suit or adopt a conclusion that has since proved to be unwarranted.

The evidence respecting the economic conditions existing during the years, 1961, 1962, 1963, would appear to be far more reliable as a guide in determining the effect of the merger than the "prognosis" mentioned in *Brown Shoe.*

One of the principal witnesses for the government supplied evidence which is of material benefit to a determination of this case. He was Ward Jenssen, a market consultant who has worked for a number of chains such as Food Giant, Ralph's, Market Basket, and others. From his research it was developed that customers of supermarkets take various things into consideration including the following: price, general

appearance of the store, size and variety of brands, parking space, whether the store is in a shopping center or is a free standing store, general familiarity with the store's reputation, quality of meat, quality of produce, check stand service, cleanliness of the store, etc. The average customer is willing to drive for at least 10 minutes, equivalent to about 4 miles, to shop. Jenssen found that shoppers are willing to pass by other stores in order to go to a specific store which they believed well met their top demands. Research has thus indicated what the shopper wants. The supermarket usually offers most of these things, while the corner grocery cannot. In its "Summary of the Facts" the government states that the decline in the number of individual grocery stores resulted "largely from increasing size of supermarkets * * * and fewer stores are needed to serve a comparable number of people." This appears to account for the decrease in the number of stores and it apparently is what the consumer desires.

The evidence showed that the average shopper has from 2 to 10 competing stores within convenient distance to shop. To increase the number of stores in the area may sound good but to do so may well require a return to the corner grocery and the elimination of the services and quality and variety of products which the public now seems to demand. One thing does appear: Price reduction has gone about as far as possible. The remaining factor is service to the customer and his convenience. An effort to get up an economic environment to equalize competitors in the grocery business will not only destroy the competitive factors which afford the public the benefits which they are now receiving but may well result in much higher prices. The key to success in the grocery business in the area does not appear to rest upon the number

of stores operated but how they are operated. From all of the economic factors disclosed, there appears generally to have been a change from the small corner grocery to the supermarket. This would seem to be the main reason for the decrease in the number of stores in the area.

The evidence discloses that the competition in the area appears to remain vigorous, open to anyone and especially those with experience and training, and the consumer is reaping the full benefit. From the evidence, it cannot be concluded that the merger in question would probably lessen competition in the metropolitan area either at the time of the merger or in the foreseeable future. The defendants are entitled to judgment.

Counsel for the defendants is directed to prepare proposed findings of fact and conclusions of law and judgment pursuant to Rule 58, F.R.C.P., and to serve and lodge the same with the clerk of the court within 30 days, and plaintiff shall have 15 days thereafter to serve and file objections thereto.

Dated: September 14, 1964.

Charles H. Carr,
United States District Judge.

APPENDIX B

United States District Court, Southern District of California, Central Division

Civil No. 336-60-CC

UNITED STATES OF AMERICA, PLAINTIFF

v.

VON'S GROCERY CO. AND SHOPPING BAG FOOD STORES, DEFENDANTS

Findings of Fact and Conclusions of Law

The above-entitled matter having come on regularly for trial on June 11, 1963 before the Honorable Charles Carr, Judge of the above-entitled Court; plaintiff United States of America being represented by James J. Coyle, John F. Hughes and Malcolm F. Knight, and defendants being represented by Johnson, Bates & Sheffield, by James E. Bates, and O'Melveny & Myers, by William W. Alsup and William W. Vaughn; and evidence, both oral and documentary, having been received; and the matter having been reopened on March 23, 1964 for the taking of further evidence and for oral argument; whereupon the case was submitted for decision;

Now, therefore, the Court, being fully advised in the premises, does hereby make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. As of March 25, 1960, when this action was commenced, defendant Von's Grocery Co. (hereinafter Von's) operated 28 grocery stores, all of which

were located in Los Angeles and Orange Counties, California, and Von's was one of the leading chains of supermarkets in the Los Angeles Metropolitan Area.

2. Von's is a Delaware corporation and is the successor to a family partnership which entered the retail grocery business in 1932 by undertaking to operate the grocery concession in a small grocery store in the City of Lynwood, Los Angeles County, California.

3. Thereafter, Von's opened other stores until in 1948 it was operating 14 grocery stores whose total sales were approximately $21,794,000. In 1954, Von's had 19 stores and sales of $63,730,000. In 1958, it had 27 stores and a sales volume of approximately $93,703,000. This amounted to approximately 4.7% of total grocery store sales and 4.2% of total food store sales in Los Angeles and Orange Counties, meaning that in terms of sales Von's ranked third among all grocery concerns operating in those two counties. Both Safeway and Ralphs had greater sales. In terms of number of stores, Von's ranked eighth behind Safeway (154 stores), Alpha Beta (48 stores), Thriftimart (43 stores), Market Basket (39 stores), Shopping Bag (34 stores), Ralphs (34 stores), and Fox (34 stores). In 1959 Von's had 28 stores and sales of approximately $86,606,000, or an average of approximately $3,000,000 in sales per store. The Von's supermarkets are of the self-service, cash-and-carry type.

4. For the most part, Von's stores were located in the southern and western portions of the Los Angeles Metropolitan Area.

5. Von's also owned and operated a modern distribution center; direct railroad and truck shipments were made to this distribution center which provided facilities to receive and distribute the groceries to

Von's supermarkets throughout the Los Angeles area. After the merger with Shopping Bag hereinafter described, Von's sold its distribution center to a competitor and has since used the former Shopping Bag distribution center.

6. As of March 25, 1960, Shopping Bag Food Stores (hereinafter Shopping Bag) was a California corporation operating 36 grocery stores in Los Angeles and Orange Counties, California, and two grocery stores in San Bernardino County, California. Shopping Bag was one of the leading chains of supermarkets in the Los Angeles Metropolitan Area.

7. Shopping Bag was the successor to a partnership consisting of W. R. Hayden and W. B. Rorex, which began business in 1930 with the operation of a grocery concession in a small grocery store in Los Angeles County. The partnership commenced operating a grocery concession in a second store in 1931. It added two more grocery concessions in 1932 and two more in 1933. In that year the partnership was dissolved and a corporation, Shopping Bag Markets, formed to succeed it. In 1947, the corporation's name was changed to Shopping Bag Food Stores.

8. By 1945, Shopping Bag had 12 stores and was operating all the concessions in them. In that year, W. D. Rorex retired and thereafter the majority of the stock in Shopping Bag was owned by W. R. Hayden and his family.

9. Shopping Bag continued to expand its business. In 1948, Shopping Bag had 15 stores and sales of approximately $11,396,000. In 1954, it had 23 stores and sales of approximately $52,444,000. In 1958, it had 36 stores and approximately $90,531,000 in sales. Two of these stores were in San Bernardino County. The remaining 34 in Los Angeles and Orange Counties had sales of approximately $84,164,000 in 1958.

This gave Shopping Bag approximately 4.2% of total grocery stores sales and 3.8% of total food store sales in Los Angeles and Orange Counties, meaning that Shopping Bag ranked sixth in terms of sales behind Safeway, Ralphs, Von's, Market Basket and Thriftimart, and fifth in number of stores (see Finding 3). In 1959, with 38 stores (two of which were outside the Los Angeles Metropolitan Area), Shopping Bag had sales of approximately $84,404,000, or an average of $2,100,000 sales per store; all of its stores were of the self-service, cash-and-carry type.

10. For the most part, Shopping Bag stores were located in the northern and eastern portions of the Los Angeles Metropolitan Area.

11. On March 28, 1960, Shopping Bag was merged into Von's. Shopping Bag shareholders received Von's stock in return for their Shopping Bag stock.

12. Many of the factors which affected the officers and directors in consummating the merger of the two corporations were:

(a) The operations of the two chains complemented each other with little overlap in the geographical areas each served.

(b) Prior to the merger, W. R. Hayden was the most actively responsible officer and stockholder carrying on the affairs of Shopping Bag's business. The management of the company was in his hands and he was assisted by only a few other executives. By 1959 it was apparent that Shopping Bag's earnings and profits were declining, even though its sales were increasing. This was a matter of grave concern to Shopping Bag and to its president and principal stockholder, Mr. Hayden. The following table shows Shopping Bag's total sales, net income, percentage of net income to total sales and percentage of net profit after taxes to total assets for the years 1957, 1958 and

1959. For purposes of comparison, the same fiscal information for Von's is also set forth:

SHOPPING BAG

Year	Total Sales	Net Income	% of Net Income to Total Sales	% of Net Profit to Total Assets
1957	$87,007,857	$1,390,986	1.6%	6.6%
1958	90,531,209	912,851	1.0%	3.9%
1959 [1]	84,403,866	770,122	.9%	3.2%

VON'S

Year	Total Sales	Net Income	% of Net Income to Total Sales	% of Net Profit to Total Assets
1957	$89,990,056	$1,872,943	2.1%	12.7%
1958	94,463,963	1,947,367	2.1%	12.4%
1959 [1]	86,605,829	1,981,358	2.3%	10.8%

[1] A four-week strike in January 1959, resulted in lower sales for each company in that year.

(c) After more than 30 years in the grocery business, Mr. Hayden wanted to become less active but he was concerned about what would happen to Shopping Bag if he were to do so because Shopping Bag did not have a strong managememnt staff to take over his responsibilities. Von's had a superior organization and a management team which was capable of operating a chain of 60 or 70 stores.

(d) It was anticipated that (and this has proved to be the case) the merger would result in greater efficiency and lower operating costs for the two companies combined than they could have achieved otherwise. Savings would be realized primarily in overhead, general and administrative, advertising, warehousing, and distribution expenses.

(e) Prior to the merger, the Von der Ahe family owned 80% of Von's stock and the Hayden family held 60% of Shopping Bag's stock. It was recognized that the death of any member of either family who held a large number of these shares might create

estate tax problems requiring the forced sale of stock in order to meet death taxes. The merger gave Von's 5,344 public stockholders and a much broader and more active market for its stock. By reason of the merger, Von's was able to meet the listing qualifications of the New York Stock Exchange and, accordingly, Von's stock was listed on that Exchange in 1961. The merger has resulted in a more favorable market atmosphere for the disposal of stock by either the Von der Ahe or Hayden families.

13. Shopping Bag had expanded rapidly through internal growth. However, it suffered from a shortage of qualified executive personnel.

14. The parties have agreed and the Court finds that the relevant line of commerce in this case is groceries and related products taken as a whole. These are the products usually and customarily offered for sale in supermarkets and grocery stores, and consist of groceries, meats, produce, bakery goods, dairy products, delicatessen products, frozen foods, fruits, vegetables, household supplies, drugs and sundries; in 1959 the sale of food products accounted for 90% of all sales by grocery stores in the area.

15. The parties have agreed and the Court finds that the relevant section of the country in this case is the Los Angeles Metropolitan Area, which is defined as Los Angeles and Orange Counties, California. Los Angeles ranks as the second largest metropolitan area in the United States in terms of population, income and retail dollar sales; approximately 6,750,000 persons resided in the area and total retail sales were approximately $9,100,000,000 in 1957. The Los Angeles Metropolitan Area is an appreciable trade area and a section of the country within the meaning of Section 7 of the Clayton Act; sales of groceries in the area approximate $2,500,000,000 annually.

16. The plaintiff made no attempt to predicate its case upon the basis that suppliers had been eliminated or adversely affected by the merger.

17. In the 1920's and 1930's, the grocery business in Los Angeles was being conducted from small, corner grocery stores. In these stores, usually one man or one company would operate the grocery concession or department, another the meat concession, another the produce concession, and so on. Sales in a typical store of this character were from $2,000 to $2,500 a week. Few housewives had automobiles at their disposal during the day. Consequently, they usually had to walk to the grocery store where they did their shopping. This meant that the area from which the typical store drew most of its customers was limited to a block or two in any direction and if a particular grocery store happened to be the only one in its immediate neighborhood, it had a virtual monopoly of local trade. In the 1920's there were a number of "chains" doing business in Los Angeles. They included Piggly Wiggly, E. A. Morrison, Humpty Dumpty, Crown Emporium, Ralphs, and Von's (a company then owned by Charles A. Von der Ahe, the father of the men who started and still operate the present Von's). These chains operated from 10 to 90 grocery concessions in small grocery stores. In addition, there were a number of smaller concerns operating less than ten grocery concessions as well as many who operated only one concession.

18. Between 1927 and 1929, MacMarr Stores acquired the then Von's, E. A. Morrison, Humpty Dumpty, Crown Emporium and other chains in Los Angeles. Later, Safeway Stores acquired Piggly Wiggly, and in 1931, Safeway acquired MacMarr. This gave Safeway over 1,000 stores in the Los Angeles area.

19. During the 1930's, Safeway was the leading chain in the retail grocery business in Los Angeles. Ralphs was also operating a successful chain. Concerns which were later to become larger, such as the present Von's, Shopping Bag, Market Basket, Thriftimart or their predecessors, started with one store in or about 1932.

20. Starting in the late 1930's, the concept of a grocery store being divided up into concessions or departments operated under separate ownerships began to undergo a change. Certain concerns commenced to operate all departments in their stores.

21. In the early 1940's, another change in grocery retailing began to take place—a trend toward larger stores, called supermarkets, which offered a greater number and variety of products. Automobiles were more widely owned in the 1940's and many people chose to drive to the grocery store, meaning that it was desirable for a store to provide parking facilities. Many of the new supermarkets had parking lots. In view of their larger size, parking facilities and other attractions, supermarkets began drawing customers from a wider area than had the grocery stores of the 1920's and 1930's.

22. During World War II, there was a building moratorium, but as soon as the war was over, many new supermarkets were constructed in the Los Angeles Metropolitan Area, keeping pace with the population explosion which this area was experiencing.

23. The change in the number of stores in the area is indicated by the following computations in which the word "multiple" means units of two or more stores operated by one concern:

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	January 1, 1960	January 1, 1961	January 1, 1963
Single	5,365	3,818	3,590
Multiple	856	923	958
Total	6,221	4,741	4,548

The foregoing figures appear to be the most reliable which could be obtained.

24. The following are some of the reasons for the decline in the number of stores in the period January 1, 1950 to January 1, 1963:

(a) The development of the supermarket and the shopping centers led to a decrease of the number of small neighborhood grocery stores of both single store operators and the chains;

(b) The shift in population, the shift in transportation from street cars to automobiles and the many changes in merchandising methods which effected the change to the supermarket era;

(c) Failures of some of the local chains and single store operators;

(d) Closings to move to better locations;

(e) Failures due to lack of experience in the grocery business (although it was impossible to arrive at the number of failures in this category);

(f) Closings because of the construction of the freeway system (and while the number must have been substantial it was impossible to determine the number of such closings);

(g) Many people seemed to prefer the supermarket with its greater variety of products, greater parking convenience, better service, more modern appearance, and the like;

(h) The supermarket, being larger in size, could serve the same number of people as two or three of the older, smaller stores, and hence a fewer number of stores were needed.

25. In 1948, Safeway operated a large number of stores in the Los Angeles Metropolitan Area and had sales amounting to 14.2% of total grocery store sales in the area. Ralphs had 32 stores and 6.9% of the area's total grocery store sales. No other concern had as many as 30 stores or as much as 3% of the area's total grocery store sales. For example, Mayfair had 22 stores and 2.4% of the total grocery store sales in the market. Market Basket had 26 stores and 2.2% of the market. Von's had 14 stores and 2.4% of the market. Shopping Bag had 15 stores and 1.2% of the market.

26. The 1950's were characterized by vigorous competition. Population continued to increase and so did the construction of new grocery outlets. Despite the decline in number of stores referred to in Finding 22 above, the evidence showed that there is scarcely a single household in Los Angeles and Orange Counties which does not have a choice of from three to ten competing grocery stores within convenient shopping distance.

27. The 1950's were also characterized by the entry into the market of new concerns and the growth of existing smaller concerns. The market leaders, Safeway and Ralphs, were not able to maintain their preexisting share of the total grocery store sales in the face of this increased competition. For example:

(a) In 1948, Safeway and Ralphs together had total sales in the area of approximately $193.5 million. This represented 21.1% of all grocery store sales in Los Angeles and Orange Counties. In 1958, Safeway and Ralphs had combined sales of nearly $288 million but their combined share of the total grocery store business had declined to 14.3%. Safeway's percentage market share declined from 14.2% to 8% in this period and Ralphs from 6.9% to 6.4%. Thus, despite

the fact that these two leaders had increased their respective sales in ten years, they nevertheless lost ground in terms of share of the market to other concerns.

(b) This loss of market position is attributable to the success and growth of smaller concerns. In 1953, there were 96 concerns operating two or more stores in Los Angeles and Orange Counties. By 1962, there were 150 such concerns operating a total of 1,085 stores. The greatest increase in number of competitors occurred in the case of concerns operating two or three stores. In 1953, there were 56 of them. In 1962, there were 104, an increase of 86%. In addition, in 1962 there were 22 concerns with from four to nine stores each, and 24 concerns (including Safeway and Ralphs) with 10 or more stores each. Seven of the 24 concerns with 10 or more stores in 1962 opened their second market sometime after 1953. Moreover, as of the end of 1961 there were approximately 3,800 single store operators doing business in the Los Angeles Metropolitan Area.

28. The opportunities for entry, success and growth of smaller concerns can be illustrated by examples of some of the grocery businesses which have been started or have experienced growth since 1950:

(a) *Hughes Markets*—Joseph P. Hughes left the employ of Thriftimart in 1952 and opened the first Hughes Market. By 1958, Hughes had opened six more new stores and the company's annual sales exceeded $21 million. By 1963, Hughes had a total of 13 stores in the Los Angeles Metropolitan Area.

(b) *Shoppers Markets*—Shoppers Markets started with one store in 1942. In 1949 it added its second store. It opened another in 1950, another in 1952, another in 1956, three in 1958, four more in 1961 and another in 1962. Today Shoppers is a 14-store chain.

(c) *Pantry Food Markets*—For 21 years, Ted R. Wood was an employee of Alpha Beta. In 1954, Mr. Wood left Alpha Beta to start his own business. He and seven others invested their savings, a total of $48,000, in a grocery store in Pasadena which was opened for business in March, 1955. This was the beginning of Pantry Food Markets. Another store was opened in July, 1955. A third store was added in 1956, a fourth in 1957, and a fifth in 1958. Between June, 1959 and December, 1961, Pantry opened five new stores, bringing its total to 10.

(d) *Food Giant*—In 1954, Food Giant had two stores. By 1958 it had 19. In 1960 it had 29. By October, 1962, it had grown to a 53-store chain and by February, 1963, it had opened six additional stores, giving it a total of 59. Some of Food Giant's stores were acquired from other companies, but most of them were new supermarkets opened for the first time by Food Giant.

(e) *The Boys Markets*—The first Boys Market was opened in the 1920's. The company slowly expanded to a nine-store chain in 1958. By 1963, it was operating 25 stores in Los Angeles and Orange Counties.

(f) *Michael's Markets*—Prior to 1960, Joe B. Goodnight was an employee of Alpha Beta. He left his position with that concern to open the first Michael's Market on July 28, 1960. By October, 1962, Michael's Markets was operating a chain of seven supermarkets in Orange County.

(g) *Gelson's Markets*—Eugene and Bernard Gelson started in business in 1946 by purchasing a 700 square foot market in North Hollywood for $5,000, their combined savings at the time. By 1962, the Gelsons had built and were operating two of the largest supermarkets in Los Angeles County. One of them, located in Burbank, is 26,000 square feet in size. It

was opened in 1951. The other, opened in Encino in March, 1960, has 37,000 square feet and enjoys annual sales of approximately $6,000,000.

29. A history of the retail grocery business in Los Angeles would be incomplete without reference to the significance of cooperative buying. In 1922, fifteen of the smaller grocery retailers concluded that they could more effectively compete against some of the chains then doing business in Los Angeles and that they should take action to become more competitive. Having difficulty competing effectively because those chains could buy their groceries directly from suppliers in large enough quantities to afford them quantity discounts, while the operator of one or two stores had to purchase groceries in smaller quantities and at higher prices from wholesalers; as a result chain stores could profitably sell their merchandise at prices which were sometimes lower than the prices which the small retailer paid his wholesaler for the same merchandise. Accordingly, these fifteen grocers decided to pool their resources and buy their groceries directly from suppliers through one common warehouse. This afforded them the same advantages of direct buying and quantity discounts which the larger chains enjoyed.

30. This method of purchasing proved successful. In 1924, a corporation named Certified Grocers of California, Ltd. was formed to carry on the cooperative buying of groceries. This corporation was and still is wholly owned by the grocery retailers who buy through it. Certified buys in large quantities at favorable prices, warehouses its grocery products and then distributes them to its stockholders (called "members") who are its only customers.

31. Today, Certified is the largest retailer-owned food wholesaler in the United States. Its membership consists of 873 retail grocery concerns which

operate approximately 1,557 retail stores. In addition, Certified's wholly-owned subsidiary, Spartan Grocers, has 1200 members who operate 1255 stores. Most of Certified's and Spartan's members do business in Los Angeles and Orange Counties, although Certified does serve some members in other parts of Southern California as well as in Arizona, Nevada and elsewhere.

32. Certified handles more than 13,000 items, consisting of dry groceries, frozen foods, delicatessen products and certain non-food products such as health and beauty aids, housewares and appliances. Certified deals primarily in branded items but does have certain products available under its private label, Springfield. By reason of the large volume in which Certified makes its purchases, its members can buy these products through Certified on a competitive basis with the larger chains. Some of the larger chains buy their grocery products through Certified.

33. Certified operates one warehouse which is 565,-280 square feet in size, another warehouse which is about half that size, a coffee processing plant, a bean packaging plant and a frozen food warehouse. It has 340 trucks which travel more than 2½ million miles a year delivering merchandise to Certified's member stores. Certified also provides its members with assistance in merchandising, advertising, promotions and inventory control.

34. In 1948, Certified's wholesale sales to its members reached a then all-time high of $87 million. By 1954, its annual sales were $198 million and in 1962 they were $345 million. Thus, in the 14 years since 1948, Certified's sales to its members increased by more than 400%. The volume of Certified's purchases exceeds by a large measure the volume of purchases of any chain which does business in the Los

Angeles Metropolitan Area, with the exception of large national chains such as A&P, Safeway, and Acme Stores (Alpha Beta).

35. Orange Empire Co-op, a buying cooperative sponsored by A. M. Lewis Co., offers substantially the same products, services and advantages to its members as Certified. Orange Empire has more than 1000 members, a large number of which do business in Los Angeles and Orange Counties. In 1945, Orange Empire's wholesale sales amounted to less than $13 million. In 1961 its wholesale sales were approximately $280 million. In 1962, its wholesale sales were $321 million.

36. The membership of Certified is made up mainly of small grocery retailers which are the primary source of Certified's business. About the only grocery concerns doing business in Los Angeles or Orange Counties which do not belong to and buy from one cooperative or another are the very small so-called "Mom and Pop" stores and a few, but not all, of the large chains. The single store operator or small grocer, by reason of membership in Certified, Orange Empire, or Spartan, can compete successfully with the large chains in purchasing products carried by such cooperatives.

37. Many of this area's leading chains commenced business here with one store, and the opportunity to buy through a cooperative.

38. Certified, Spartan and Orange Empire do not carry fresh meat or produce or certain dairy items. The single store or small operator can effectively compete in purchasing produce. The evidence fails to support the plaintiff's claim that the large chains have a substantial advantage in the purchase of meat supplies or dairy items.

39. Competition in the retail grocery business in

Los Angeles, as in other retail businesses, is a contest for the patronage of consumers. Direct competition usually exists between any two stores only to the extent that they vie for the patronage of the same customers, although the evidence showed that there is a network of competition in the area in the sense that stores respond to competitive practices initiated by a competitor. In some densely populated areas, a store's draw area will often be limited to less than a mile. The average customer is willing to drive for at least 10 minutes, equivalent to about four miles, to shop and to pass by other stores in order to go to a specific store which she believes will meet her top demands. In some localities, natural or man-made barriers such as hills, freeways, railroad tracks and the like will limit a store's draw area. The limitation thus imposed on the draw area of any particular store means that it is in substantial competition only with other stores in the same immediate vicinity. A store in Santa Monica does not compete directly with a store 20 miles away in Pasadena. Each of those stores competes directly only with stores nearby and then only to the extent that they can attract the same customers. Chains with stores in many communities compete with concerns, both large and small, which also have stores in those communities. On the other hand, a concern with only one store competes directly only with concerns operating stores nearby.

40. Customers of supermarkets take various things into consideration in choosing a market at which to shop, including the following: Price, general appearance of the store, size, variety of brands, parking space, whether the store is in a shopping center or is a free-standing store, general familiarity with the

store's reputation, quality of meat, quality of produce, courteous service and cleanliness of the store.

41. Prior to the merger, the twenty leading chains of supermarkets in the Los Angeles Metropolitan Area were all a part of the retail grocery competition in the Los Angeles Metropolitan Area and as such each of these chains competed with each other and with other corporations and firms engaged in the purchase, distribution and retail sale of groceries and related products in the Los Angeles Metropolitan Area. As a part of the competition, the major chains as well as other grocers frequently responded to competitive practices originated by one of the other major chains. Competition between individual Von's and Shopping Bag stores was limited to those instances where a store of each company was so located that both could compete for some of the same customers. In such instances, "the competition was intensive."

42. Prior to the merger, both Von's and Shopping Bag were substantial competitive factors in the Los Angeles Metropolitan Area and said area is a substantial and significant economic market.

43. During the last thirty years, the smaller grocery concerns doing business in Los Angeles and Orange Counties—concerns operating one, two or three stores—have proven their ability to compete with each other and with stores operated by larger concerns. As noted in Finding 37, many of today's chains entered the grocery business in Los Angeles with one store and were able to grow. Many others have chosen to stay small but they, too, have operated and continue to operate successful businesses.

44. The following examples of successful smaller concerns doing business in the Los Angeles Metropolitan Area illustrate the competitive opportunity available to firms of any size:

(a) *Reynold Elkin,* after 18 years of experience as an employee of various chains, acquired an older store in Inglewood in 1958. Directly across the street was a newer, larger Safeway store and within a mile of this store is a Von's, a Thriftimart, a Fox and a number of single stores. Mr. Elkin has increased his sales by 400% since 1958.

(b) *Harlos Gross* purchased an old Shopping Bag store in Temple City in 1953. His sales were $600,000 in the first year of operation, but have exceeded $1,000,000 in every year since then despite the fact that after 1953 twelve new grocery stores, many of them operated by larger chains, opened up within a radius of two miles of his store.

(c) *Albert Goldstein* was an executive of Boys Markets from 1933 to 1958 and Vice President and General Manager of Food Giant from 1958 to October, 1962, during which time Food Giant grew from a 19 to a 53-store chain. In October, 1962, Mr. Goldstein went into business on his own by purchasing an older Food Giant store directly across the street from a newly opened Von's store located in a large shopping center. Mr. Goldstein can and does operate this store successfully in competition with Food Giant and in the face of the new competition from Von's.

(d) *Joseph Goldberg* was a former executive of King Cole, Inc., a six-store chain. In March, 1961, that chain disbanded and Mr. Goldberg took over operation of one of its stores in Whittier. This store is within 100 yards of a Safeway and a Food Giant, both of which stores are larger and newer than Mr. Goldberg's. Under King Cole, this market had sales of $2.9 million a year. In the first year of its operation under Mr. Goldberg's ownership, its sales were $3.5 million.

(e) *Lester Eaton,* a government witness, purchased

a small grocery store in La Puente in 1952. At the time, Mr. Eaton was 24 years old and his only experience in the grocery business consisted of working as a clerk for six months in the store he acquired. Mr. Eaton's initial investment in the business was $1,000, his total savings at the time. In the next ten years, Mr. Eaton increased sales in his store from $72,000 to $450,000 a year, despite the fact that various of the larger chains opened new stores nearby. With profits made from the operation of his store, Mr. Eaton has purchased a $30,000 parcel of real property on which he plans to build a new supermarket.

(f) *Paul Palmer,* another Government witness, started in the grocery business in 1946. At that time, his total capital assets amounted to $16,000. Today he is the sole stockholder of Country Cousins, Inc. which successfully operates a four-store chain and which has annual sales of more than $6,000,000 and a net worth of between $1½ and $2 million.

(g) *Jerry Fleishman,* another witness for the Government, was discharged from his position with Shoppers Markets at the age of 45. In 1956, he acquired a small grocery store in Los Angeles. In the next five years, Mr. Fleishman earned more money from this small store than he had made in all the preceding years of his life.

45. There are no substantial barriers to entry into the retail grocery business in the Los Angeles Metropolitan Area.

46. Seven of the 24 concerns operating 10 or more stores in the Los Angeles Metropolitan Area in 1961 opened their second store sometime after 1952. Concerns operating two or more stores in Los Angeles and Orange Counties increased in number from 96 to 150 from 1953 to 1962, with the greatest numerical

increase appearing in concerns which operated two or three stores.

47. Records of the State Board of Equalization show that in 1960, 128 grocery stores were opened in the Los Angeles Metropolitan Area by concerns which apparently were new entrants. In the same year, there were 119 openings by concerns operating at least one other store.

48. Eighteen of the 30 government industry witnesses and 10 of the defendant's industry witnesses commenced their present businesses subsequent to the year 1948.

49. Many executives from chain store operations have left the various chains and opened up stores on their own, usually beginning with a single store and ultimately developing into a small chain of supermarkets. One of the great problems for the larger chains is the loss of executives who leave to open grocery businesses of their own. In many instances these persons have purchased a single store of one of the chains, usually where it was not doing too well, and from that point developed a successful grocery retail business. The experience gained while employed by larger chains has apparently been the basis for the success of many of these operations. There is no doubt that experience in the grocery business has usually made it possible for a person to enter the retail grocery field as a single-store operator and be successful. On the other hand, several of the chains encountered difficulty because of lack of experience, over-expansion and lack of capitalization and were forced into bankruptcy or compelled to sell.

50. As a result of its merger with Shopping Bag, Von's in 1960 ranked second behind Safeway in terms of both sales and number of stores in the Los Angeles Metropolitan Area. The warehousing and distribu-

tion facilities of Von's and Shopping Bag were combined and personnel of the two concerns were realigned under a single management. None of the stores of the two concerns was closed. Each store continued to operate under either the name "Von's" or the name "Von's-Shopping Bag."

51. The merger of Shopping Bag into Von's did not materially change the competitive situation in the area. It did not increase or decrease competition store for store with any grocery concern, whether single store or chain, since the acquired stores continued as before.

52. The merger has had no adverse effect on competition in the more than four years since it was consummated. Competition prior to the merger was intense and vigorous and it is no less so today. There is no evidence from which it could be concluded that there is a reasonable probability of any lessening of competition in the foreseeable future.

53. It is difficult to determine with precision exactly what draw area a particular store has. Nevertheless, it appears that Von's and Shopping Bag stores were actually directly competing for some of the same customers in only four or five areas of the entire Los Angeles Metropolitan Area. In each of these areas there were, and still are, at least six other stores operated by chains as well as a number of stores operated by smaller concerns competing with Von's and Shopping Bag for the patronage of customers. Any elimination of competition between Von's and Shopping Bag stores as a result of the merger would not have, and in fact has not had, any discernible effect on competition generally in the Los Angeles Metropolitan Area.

54. Shopping center developers prefer to deal with a large grocery chain with a well-advertised name

which will attract attention and also induce other large concerns to lease areas in the shopping center. Also, it is only natural that the shopping center owner would prefer a company with the greater financial resources. As a result, the larger chains with greater financial resources are most often sought after as shopping center tenants and smaller concerns therefore have difficulty in obtaining shopping center locations. Not all good grocery store locations are in shopping centers. Prior to the merger Von's was able to and it did obtain shopping center locations.

55. Prior to the merger both Von's and Shopping Bag bought directly from suppliers and operated their own warehouses and their own trucks by means of which merchandise was distributed to their stores. Many chains undertake to buy, warehouse and distribute some or all of their merchandise rather than have these functions performed for them by a cooperative because they deem it desirable to do so in order to assure adequate inventory control and to better control their greater distribution problems which necessarily arise in the operation of a number of stores. Prior to the merger, both Von's and Shopping Bag bought directly from suppliers, operated their own warehouses and their own distribution systems, and since the merger Von's has continued to do so.

56. The acquisition of Shopping Bag by Von's has not resulted in an undue reduction in the number of competing enterprises in the retail grocery business in the Los Angeles Metropolitan Area.

57. There was and for the foreseeable future appears to be no reasonable probability that the acquisition of Shopping Bag by Von's will have the effect of unduly reducing the number of competing enterprises

in the retail grocery business in the Los Angeles Metropolitan Area.

58. The Von's-Shopping Bag merger was not likely to, has not, and is not likely adversely to affect competition generally or otherwise in the retail grocery business in the Los Angeles Metropolitan Area. However, other events have occurred since the merger which have affected and on the whole caused an increase in competition.

59. In the year 1960, 246 new grocery stores were opened in the Los Angeles Metropolitan Area, of which 128 were new "single outlet" stores. 67 of these 246 new stores were opened by the area's twenty leading chains. 179 were opened by smaller concerns.[1] Of these 246 stores only three were opened by Von's or Shopping Bag.

60. Since the merger American Stores (now Acme Stores, Inc.), the nation's fourth largest retail grocery chain, has entered the Los Angeles market by acquiring Alpha Beta Food Stores; and Food Fair, the nation's sixth largest retail grocery concern, has entered the Los Angeles market by acquiring a number of the stores formerly operated by the bankrupt Fox Markets. Food Fair has also commenced operating grocery concessions in discount houses in the Los Angeles Metropolitan Area. On September 3, 1963, Kroger Company, the nation's third largest grocery chain, entered this market by acquiring Market Basket, one of the largest local chains.

61. Prior to the merger, the sale of groceries and related products in so-called discount houses was virtually unknown. Since the merger, this new form of grocery merchandising has become increasingly popular in the Los Angeles Metropolitan Area. Today

[1] Statistics with respect to store openings in later years have not been made available.

there are approximately 35 discount houses with food departments in that area, and the evidence indicates that this form of grocery merchandising is expanding rapidly and may well indicate a substantial additional competitive force. Typically, these discount houses are large retail establishments which sell all types of products, including appliances, soft goods and more recently groceries, at prices which are generally lower than can be found in other retail outlets. These lower prices are made possible primarily through savings which are realized in labor and overhead costs. For example, most discount house food departments have less elaborate fixtures than many supermarkets and they remain open for a shorter period of time each day, thereby avoiding overtime labor costs and the like. Retail grocery concerns such as Food Giant, Thriftimart, Lucky Stores, Food Fair, and Mayfair, as well as smaller concerns such as Foods Co. and Supreme Foods, have commenced operating food departments in discount houses since the merger. It has been shown that most discount houses have a draw area of six miles or more. The majority of the Von's-Shopping Bag stores are within six miles of a discount house.

62. Since the merger, an increasing number of bantam stores, or superettes as they are sometimes called, have been opened in the Los Angeles Metropolitan Area.

63. Another development since the merger has been the opening of so-called drive-in milk depots. These establishments are small retail outlets which sell milk, other dairy products, bread, wieners, and other convenience items. These milk depots have a natural competitive advantage in that they are permitted under regulations issued pursuant to the California Milk Control Act to sell milk at a lesser price than conventional grocery stores. There were few such

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milk depots in 1960; today they account for 16% of all the milk sold in the Los Angeles Metropolitan Area.

64. Other types of retail establishments, notably liquor stores and drug stores, are selling an increasing number and amount of products usually found in grocery stores. Some liquor stores now sell more bread than some supermarkets, and the sales of grocery products in some liquor stores exceed the sales of some "Mom and Pop" grocery stores.

65. There is no reliable evidence that as of the date of the merger on March 28, 1960 there was a reasonable probability that the merger would result in a substantial lessening of competition in the purchase, distribution or retail sale of groceries and related products in the Los Angeles Metropolitan Area.

66. In the more than four years since it took place, the Von's-Shopping Bag merger has not resulted in any lessening of competition in the purchase, distribution or retail sale of groceries and related products in the Los Angeles Metropolitan Area, and there is no reasonable probability that in the foreseeable future it will have such an effect.

67. The retail grocery business in the Los Angeles Metropolitan Area is now and for many years has been a highly competitive business characterized by a large number of firms competing for the business available at reasonable prices.

68. As of the date of the merger on March 28, 1960, there was not a reasonable probability that any retail purchaser of groceries and related products would be adversely affected by the merger.

69. There is no evidence that any retail purchaser of groceries and related products has been adversely affected by the merger.

70. There is no reasonable probability that any retail purchaser of groceries and related products will be adversely affected by the merger.

71. The effect of the merger is not substantial. Von's faces and will continue to face strong and vigorous competition. There is no reliable evidence that this merger is likely to have an adverse effect on prices or on the quality of service rendered the public.

72. In the retail grocery business in the Los Angeles Metropolitan Area there is an abundance of strong, competing sellers, a wide choice of competing stores from which the purchasing public may conveniently choose to shop, a lack of obstacles restraining new entrants into the business, and a lack of power in the defendant or others to control prices, supply or entry. All of these factors tend to insure continued vigorous competition.

73. As of the date of the merger, there were more than 4,000 separate concerns operating more than 4,800 grocery stores in Los Angeles and Orange Counties. After the merger, Von's was operating a total of 64 stores—less than 1.4% of the total number of stores in the two counties.

74. In 1958, i.e., two years prior to the merger, Von's percentage of sales of groceries and related products in the Los Angeles Metropolitan Area was 4.7% and Shopping Bag's was 4.2%, as compared to the 8% of Safeway and 6.4% of Ralphs. After the merger, however, on March 28, 1960, Von's did not become the market leader in the Los Angeles Metropolitan Area. In the year 1960, Safeway Stores operated 146 grocery stores in the area, the sales of which were $184,313,000. This represented approximately 8% of total grocery store sales and 7.4% of total food store sales in Los Angeles and Orange Counties. In

the same year, Von's and Shopping Bag prior to the merger and Von's after the merger operated a total of 66 stores in the Los Angeles Metropolitan Area. These stores had sales of $172,488,000 in 1960 which represents 7.5% of total grocery store sales and 6.9% of total food store sales in the two counties.

75. Both Von's and Shopping Bag were local concerns of local origin, both having commenced business in the 1930's with one store and having grown a store at a time thereafter. (See Findings 1 through 9.) Von's is still a local concern. All but 8 of its stores are located in Los Angeles and Orange Counties. The remaining 8 are located in adjoining counties (i.e., San Bernardino, San Diego and Ventura.) Also doing business in the Los Angeles Metropolitan Area are the following, all of which have stores in competition with one or more Von's stores:

(a) *The Great Atlantic & Pacific Tea Co. (A&P)*, the largest retail grocery concern in the United States, which in 1962 had a total of 4,475 stores located in 38 states and Canada, sales in excess of $5 billion a year and assets in excess of $767 million.

(b) *Safeway Stores, Incorporated,* the nation's second largest retail grocery concern, which in 1962 had several thousand stores in 29 states and Canada, sales in excess of $2.5 billion annually and assets of more than $473 million.

(c) *Alpha Beta-Acme,* a wholly-owned subsidiary of Acme Stores, Inc. (formerly American Stores), the fourth largest retail grocery concern in America. Acme Stores, Inc. in 1962 had 845 stores, sales in excess of $1 billion annually and assets of more than $209 million.

(d) *Food Fair Stores, Inc.,* the nation's sixth largest grocery chain which in 1962 had 465 stores in ten states, sales of nearly $1 billion a year and assets of $193 million.

(e) *Mayfair Markets,* which in 1962 operated 178 supermarkets in California, Arizona, Utah, Idaho, Oregon and Washington, had sales in excess of $288 million annually, and total assets of more than $62 million.

(f) *Lucky Stores, Inc.,* which in 1962 operated 141 supermarkets in California, Arizona and Washington, had sales of more than $232 million annually and total assets in excess of $47 million.

76. *The Kroger Co.,* the nation's third largest chain, which did not previously do business in the Los Angeles Metropolitan Area, has now acquired Market Basket, a local chain with 55 stores located primarily in Los Angeles and Orange Counties. Kroger in 1962 had a total of 1,354 grocery stores in 23 states, annual sales of nearly $2 billion, and total assets of more than $400 million.

77. In addition, there are approximately 17 "local" chains operating 10 or more stores in Los Angeles and Orange Counties (seven of which were not operating as many as two stores as late as 1952), 126 other concerns operating two or more stores in those counties and several thousand single-store operators.

78. The acquisition of Shopping Bag by Von's did not result in any appreciable increase in the level of concentration measured in terms of the market share of the leading concerns doing business in the Los Angeles Metropolitan Area, even as reflected by plaintiff's Exhibit 8. According to that exhibit, the share of the business accounted for by the 12 largest firms, for example, increased from 48.8% to 50.0%, or by only 1.2%, and the market share of the top twenty increased from 56.9% to 57.4%, or by only ½ of 1%.

79. The area's leading twenty concerns in 1950 enjoyed sales which amounted to approximately 40% of total grocery store sales in the Los Angeles Metro-

politan Area. The twenty leading chains in 1960 had sales amounting to approximately 54% of the total. The fact that the leading twenty chains in 1960 were in part made up of concerns which either were not in existence or were not in the leading twenty in 1950 makes any comparison between them virtually meaningless other than the fact that it shows the ability of smaller concerns to grow and expand. The fact that the market share of the leading three, four and five concerns has declined in recent years means that any increase in the market share of the leading twenty concerns is attributable to the growth of smaller concerns. At least seven of the concerns in the top twenty by 1960 were not even in existence as chains (i.e., having more than one store) in 1948. They are Food Giant, Fox, Hughes, Yor-Way, McCoy's Shoppers and Pix.

80. There has been no increase in concentration in the retail grocery business in the Los Angeles Metropolitan Area either in the last decade or since the merger. On the contrary, economic concentration has decreased despite the disappearance of a number of the smaller, older, corner grocery stores for the following reasons:

(a) In 1952 there were ten concerns which each operated ten or more stores in Los Angeles and Orange Counties. These concerns expanded their operations in the following decade. The growth and success of these concerns did not deter others from entering the business and expanding. By 1961, 14 smaller concerns had grown to the point where they also were operating ten or more stores in the two counties. Seven of these opened their second store sometime after 1952. In addition, the number of concerns operating more than one but fewer than ten stores increased in number from 86 in 1952 to 126

in 1961. Neither the size nor subsequent growth of the market leaders in 1952 offered any deterrent to the entry and growth of smaller concerns.

(b) In 1948, Safeway was the leading chain operating in Los Angeles. Both its assets and number of stores were many times greater than any of its rivals (with the exception of A&P which had only 21 stores in Los Angeles at the time). However, other companies, the vast majority of which were local concerns, were able to compete effectively against Safeway. Although Safeway's sales increased its percentage share of the market declined.

(c) The share of the market enjoyed by the leading three, four and five concerns declined from 1952 to 1960 while the market share of smaller concerns increased.

(d) By 1958, the leading twenty concerns accounted for only slightly more than half of the total grocery store sales in Los Angeles and Orange Counties. After 1958, their market share declined.

(e) The entry and growth of new and smaller concerns, the declining share of the market of the industry's leaders, the inability of larger concerns to dominate the market to any degree despite their own success and expansion, and the ability of smaller concerns to compete effectively against larger ones indicates there is no likelihood of a tendency to monopoly.

81. There have been some prior mergers between retail grocery concerns in the area but the evidence is that these acquisitions were either market extensions by companies not previously doing business in the area (e.g., Lucky Stores, Kroger, Acme Markets, Inc., Food Fair), or were in part offset by the subsequent failure of the acquiring concern and the disposal of its stores (e.g., Fox, McDaniel's and Yor-

Way), or were largely if not entirely offset by sales by the acquiring concern of a large number of the acquired or others of its stores (e.g., Thriftimart, Mayfair). The history of the grocery business in this area is marked by the fact that the larger chains furnish the training, experience and frequently the stores for the future competitors who leave their employ to enter into the grocery business for themselves. There is no evidence that Von's or Shopping Bag had been involved in any prior merger.

82. The market share of Von's after its merger with Shopping Bag is not sufficient to warrant a finding of a reasonable probability of a substantial lessening of competition or of a tendency to monopoly in the relevant market. This is particularly true in the retail grocery industry in this area for the following reasons:

(a) The competitive effectiveness of any particular store in this market is not necessarily dependent on the market share controlled by the owner of the particular retail store;

(b) Market share in the retail grocery business in this area cannot necessarily be equated with market power, particularly because of the existence of the strong cooperative buying organizations, Certified Grocers of California, Ltd. and Orange Empire, which enable the single-store operators and small chains to purchase their supplies as cheaply as the larger chains;

(c) The market share involved in this case is controlled by an entirely local company;

(d) The relative ease of entry into the business, the greatly expanding population, the inability of the industry leaders to hold their market share, the ability of new entrants and smaller concerns to survive and grow and the constant changes in and the emergence

of new forms of marketing of groceries and related products tend to insure continued vigorous and increased competition;

(e) Substantiality in a given case depends on a variety of factors. The factors mentioned above together with the experience of more than four years since the merger occurred, which has demonstrated that this merger has had no adverse effect on and has not lessened competition in this market, require the finding that there is not a reasonable probability that this merger may tend to substantially lessen competition in the relevant market.

83. There has been no tendency to monopoly evident in the purchase, distribution or sale of groceries and related products in the Los Angeles Metropolitan Area. As of March 28, 1960, there was not a reasonable probability that the Von's-Shopping Bag merger would tend, and in the more than four years since the merger it has not tended, to create such a monopoly. There is no reasonable probability that the merger of Von's and Shopping Bag may tend to create a monopoly in the foreseeable future.

84. Both Von's and Shopping Bag prior to the merger and Von's after the merger were engaged in interestate commerce in that they purchased approximately 51% of the groceries and related products ultimately offered for sale in their stores from outside California.

85. Competition in the retail sale of groceries and related products taken as a whole in the Los Angeles Metropolitan Area is competition in interstate commerce.

86. In addition to the foregoing, the Court finds in all respects as set forth in the following Conclusions of Law:

CONCLUSIONS OF LAW

The Court concludes:

1. In all respects as set forth in the foregoing Findings of Fact.

2. This Court has jurisdiction over this cause by reason of Sections 7 and 15 of the Clayton Act, as amended. (15 U.S.C. §§ 18 and 25.)

3. The relevant line of commerce for purposes of determining whether or not the Von's-Shopping Bag merger violates Section 7 of the Clayton Act, as amended, is groceries and related products taken as a whole.

4. The relevant section of the country for determining whether the Von's-Shopping Bag merger violates Section 7 of the Clayton Act, as amended, is the Los Angeles Metropolitan Area, consisting of Los Angeles and Orange Counties, California.

5. There is not a reasonable probability that the effect of Von's acquisition of Shopping Bag's stock may be substantially to lessen competition in said line of commerce and in said section of the country.

6. There is not a reasonable probability that Von's acquisition on March 28, 1960 of Shopping Bag's stock may have the effect of tending to create a monopoly in said line of commerce and in said section of the country.

7. Von's acquisition of Shopping Bag's stock does not violate Section 7 of the Clayton Act, as amended.

8. The plaintiff's proof failed to support the allegations of its complaint.

9. Defendants are entitled to judgment that plaintiff take nothing by its action.

Dated: December 16, 1964.

/S/ Charles H. Carr,
United States District Judge.

APPENDIX C

United States District Court, Southern District of California, Central Division

Civil No. 336-60—CC

UNITED STATES OF AMERICA, PLAINTIFF

v.

VON'S GROCERY CO. AND SHOPPING BAG FOOD STORES, DEFENDANTS

Judgment

This cause came on regularly for trial on June 11, 1963, before the Honorable Charles H. Carr, Judge of the above-entitled Court, and the issues having been duly tried and the Court having made its findings of fact and conclusions of law, NOW, THEREFORE, in accordance with said findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by this action.

Dated: December 16, 1964.

/S/ CHARLES H. CARR,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1965